A

KAPTEN LAM CHEE KEONG & ORS v. MALAYSIAN AIRLINE SYSTEM BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[ORIGINATING SUMMONS NO: 24NCC(ARB)-35-07-2014]
29 SEPTEMBER 2014

B

CIVIL PROCEDURE: *Injunction – Application for – Employees' society suing employer on behalf of its members in relation to members' contract of employment – Whether privity established – Locus standi – Whether internal remedies or efficacious alternative remedies exhausted – Whether injunction allowed – Specific Relief Act 1950, s. 54(i)*

C

CIVIL PROCEDURE: *Striking out – Application for – Whether applicant may rely on any one or all of grounds provided under O. 18 r. 19(1)(a) to (d) of Rules of Court 2012 – Whether separate striking out application need to be made under O. 18 r. 19(1)(a)*

D

CIVIL PROCEDURE: *Striking out – Plain and obvious case – Whether pleading obviously unsustainable – Whether mere fact that pleaded case was weak a ground to strike out – Presumption of truth of matters stated in pleadings*

E

CIVIL PROCEDURE: *Striking out – Privity of contract – Employees' society suing employer on behalf of its members in relation to members' contract of employment – Whether privity established – Locus standi – Whether internal remedies exhausted – Whether there was reasonable cause of action – Whether action vexatious, frivolous and abuse of court process – Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c) & (d)*

F

CONTRACT: *Privity of contract – Only contracting party may sue and enforce contract – Whether employees' society could sue employer on behalf of its members in relation to members' contract of employment – Whether privity established*

G

UNINCORPORATED ASSOCIATIONS: *Societies – Employees' society – Whether employees' society could sue employer on behalf of its members in relation to members' contract of employment – Whether privity established*

Malaysian Airlines Pilots' Association ('MAPA') was a society registered under the Societies Act 1966. MAPA's members were pilots employed by the defendant company. On 18 September 2008 MAPA entered into a memorandum of understanding ('MOU') with the defendant. The plaintiffs filed this suit in their capacity as MAPA's office bearers and on behalf of all members of MAPA. The plaintiffs applied for, among others, an injunction to restrain the defendant from proceeding with disciplinary action and/or to impose any punishment against the second plaintiff until the disposal of arbitration proceedings between MAPA and the defendant in respect of alleged breaches by the defendant of the MOU and the defendant's statutory duties especially those relating to regs. 79 and 80 of the Civil Aviation Regulations 1996 ('CAR') (the 'alleged breaches'). The defendant filed two

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I

applications to strike out this suit: (a) encl. 7 - an application under O. 18 r. 19(1)(b), (c) and/or (d) of the Rules of Court 2012 ('ROC'); and (b) encl. 8 - an application under O. 18 r. 19(1)(a) of the ROC. The first and second prayers in this suit sought to enforce individual contracts of employment between the second plaintiff and MAPA's members on the one hand and with the defendant on the other hand (the 'contracts'). The issue that arose was whether MAPA had the *locus standi* to commence this suit in respect of the alleged breaches.

Held (allowing encls. 7 and 8 with costs):

(1) There was no need to file two striking out applications. Only one striking out application needed to be made. The applicant may rely on any one or all of the grounds provided in O. 18 r. 19(1)(a) to (d) of the ROC as well as the court's inherent jurisdiction. When the court considers the application under O. 18 r. 19(1)(a) of the ROC, the court is barred by O. 18 r. 19(2) of the ROC from considering any affidavit evidence; (*Thong v. Saw Beng Chong,* foll; *Pegasus Engineers Sdn Bhd v. Sambu (M) Sdn Bhd*, not foll; *Suppuletchimi v. Palmco Bina Sdn Bhd*, not foll). (para 14)

(2) By virtue of the doctrine of privity of contract, only a contracting party may sue and enforce the contract. MAPA was barred by the doctrine of privity of contract from enforcing the contracts against the defendant. For the same reason, the pilots employed by the defendant could not enforce the MOU against the defendant as they were not parties to the MOU despite the fact that the MOU may have been concluded for the benefit of the defendant's pilots. As MAPA had no right to enforce the contracts against the defendant, MAPA had no reasonable cause of action. Accordingly, encl. 8 was allowed under O. 18 r. 19(1)(a) of the ROC. (paras 20 & 21)

(3) The *ratio decidendi* of *Lembaga Kumpulan Wang Simpanan Pekerja v. Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja* (*KWSP*'s case) should apply to MAPA because just as in *KWSP*'s case, MAPA was seeking to enforce the contracts to which MAPA was not a party. The extension of *KWSP*'s case to registered societies will ensure that a registered society does not file any suit to enforce any contract entered by its members with third parties, even if the proposed suit is solely for the benefit of that society's members. It is entirely up to a member of the registered society to sue the contracting party in question. (paras 26 & 27)

(4) MAPA failed to show that MAPA's private right had been infringed by the defendant; and that MAPA had suffered any damage, let alone special damages, due to the alleged breaches. Hence, MAPA failed to satisfy that it had the necessary *locus standi* to file the amended OS. If MAPA had merely sought a declaration under s. 41 of the Specific

Relief Act 1950 ('SRA') and O. 15 r. 16 of the ROC, MAPA need not prove that it had a subsisting cause of action against the defendant. However, as MAPA was seeking injunctive relief it must show that it had the necessary *locus standi*. Since MAPA had neither reasonable cause of action nor *locus standi* to bring this suit, the suit was vexatious, frivolous and constituted an abuse of court process. (paras 31 - 35)

(5) MAPA's complaint was related solely to aviation safety. It was clear from reg. 180(1)(b) CAR that MAPA's concern regarding aviation safety may be sufficiently addressed by making the necessary complaint to the DG regarding the alleged breaches and the DG had adequate powers to deal with such complaint. There was an equally (if not more) efficacious avenue for MAPA to complain to the DG in respect of the alleged breaches. There was no necessity to file this suit. Hence, s. 54(i) of the SRA applied to bar the first and second prayers. The suit was vexatious, frivolous and constituted an abuse of court process. (paras 40 & 41)

(6) MAPA could also apply to the Attorney General ('AG') to commence a relator action in respect of the alleged breaches ('relator action'). There was therefore a second efficacious alternative available to MAPA in the form of a relator action. MAPA had not adduced any evidence that MAPA had applied for the AG to file a relator action against the defendant and that such an application had been rejected by the AG. Once again, s. 54(i) of the SRA applied to strike out the suit. (para 45)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(foll)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Dato' Raja Ideris Raja Ahmad & Ors v. Teng Chang Khim & Ors [2012] 2 CLJ 288 CA ***(foll)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(foll)***

Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(foll)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja [2000] 3 CLJ 81 FC ***(foll)***

National Union of Bank Employees v. Director General of Trade Unions & Anor [2013] 7 CLJ 957 FC ***(refd)***

Pacific Centre Sdn Bhd lwn. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

Pegasus Engineers Sdn Bhd v. Sambu (M) Sdn Bhd [1998] 3 CLJ 677 CA ***(not foll)***

See Thong & Anor v. Saw Beng Chong [2012] 1 LNS 817 CA ***(foll)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***

Suppuletchimi Karpaya v. Palmco Bina Sdn Bhd [1994] 2 CLJ 561 HC ***(not foll)***

Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130 FC ***(foll)***

Legislation referred to:
Civil Aviation Act 1969, s. 2B(a), (c)
Civil Aviation Regulations 1996, regs. 79, 80, 180(1)(b)
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), (2), O. 92 r. 4
Rules of the High Court 1980, O. 1A, O. 15 r. 16
Specific Relief Act 1950, ss. 41, 54(i)

For the plaintiff - DS Prasad; M/s D Prasad & Partners
For the defendant - Himahlini Ramalingam (Saran Mutang Tagal with her); M/s Lee Hishammuddin Allen & Gledhill

Reported by Amutha Suppayah

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] Malaysian Airlines Pilots' Association (MAPA) is a society registered under the Societies Act 1966.

[2] MAPA's members are pilots employed by the defendant company (defendant).

[3] On 18 September 2008 MAPA entered into a memorandum of understanding with the defendant (MOU).

Legal Proceedings

[4] The 11 plaintiffs (plaintiffs) are MAPA's office bearers. The plaintiffs filed this originating summons against the defendant (this suit) in their capacity as MAPA's office bearers and on behalf of all members of MAPA.

[5] In this suit, the plaintiffs applied for, among others, the following relief against the defendant:

(a) an injunction to restrain the defendant from proceeding with disciplinary action and/or to impose any punishment (including dismissal) against the second plaintiff (second plaintiff) in respect of the defendant's "allegation letter" dated 3 July 2014 until the disposal of arbitration proceedings between MAPA and the defendant (arbitration) in respect of the following alleged breaches by the defendant (alleged breaches) of:

  (i) clauses 17 (cl. 17), 21 (cl. 21) and attachment B (Attachment B) in the seventh schedule (7th Schedule) to the MOU; and

  (ii) the defendant's statutory duties especially those related to regs. 79 and 80 of the Civil Aviation Regulations 1996 (CAR) (first prayer); and

(b) an injunction to restrain the defendant from:

  (i) issuing 'allegation letter';

  (ii) requesting for any 'explanation letter';

(iii) suspending;

(iv) taking any disciplinary action; and/or

(v) imposing any punishment (including dismissal)

– against any pilot in relation to the alleged breaches until the disposal of the arbitration (second prayer).

[6] The plaintiffs have also filed a notice of application in court encl. no. 5 for *ex parte* injunctions similar to those prayed for in the first and second prayers (court encl. 5). I directed court encl. 5 to be heard *inter partes* as the purpose of court encl. 5 would not be defeated by giving notice to the defendant – please see the High Court's decision in *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319; [1984] 2 MLJ 143, at 146, which I have followed in *Chin Wai Hong & Anor v. Lim Guan Hoe & Anor*, Kuala Lumpur High Court (Commercial Division) Civil Suit No. 22 NCC-249-07/2014, [2014] AMEJ 949.

[7] The defendant filed the following two applications to strike out this suit:

(a) in court encl. no. 7 (court encl. 7), the defendant relied on O. 18 r. 19(1)(b), (c) and/or (d) of the Rules of Court 2012 (RC) as well as the court's inherent jurisdiction and O. 92 r. 4 RC; and

(b) in court encl. no. 8 (court encl. 7), the defendant applied to strike out this suit pursuant to O. 18 r. 19(1)(a), O. 92 r. 4 RC and/or the court's inherent jurisdiction.

[8] Parties agreed that court encl. 7 and 8 would be heard together. Parties also consented to court encl. 7 and 8 be disposed off first.

[9] The plaintiffs subsequently applied to amend the second prayer to refer to the defendant's letter dated 16 July 2014 (plaintiffs' amendment application). The defendant had no objection to the plaintiffs' amendment application and accordingly, I allowed the plaintiffs' amendment application on 8 September 2014.

Is There A Requirement For Two Applications To Strike Out Same Suit?

[10] Order 18 r. 19(2) RC provides that no evidence is admissible on a striking out application made pursuant to O. 18 r. 19(1)(a) RC.

[11] In *Pegasus Engineers Sdn Bhd v. Sambu (M) Sdn Bhd* [1998] 3 CLJ 677; [1998] 4 MLJ 129, at pp. 679-680 (CLJ); 130-131 (MLJ):

(a) the appellant applied to strike out the respondent's suit under O. 18 r. 19(1)(a), (b), (c), (d) RC and/or the court's inherent jurisdiction;

(b) the learned Senior Assistant Registrar struck out the appellant's application with liberty to the appellant to file a fresh striking out application (SAR's Order);

(c) the High Court Judge affirmed the SAR's order; and

(d) the Court of Appeal dismissed the appeal as follows:

> In effect, all that the appellant had to do at the time was to file his summons again and by then he should be wary of using the offending cumulative word 'and' between ground (a) and ground (b) in his summons under O. 18 r. 19(1).
>
> We consider the whole process of appealing to the Court of Appeal for so trifling a matter as the nature of this appeal *de minimis non curat lex* (see *Re National Assurance and Investment Association, Re Cross* (1872) 7 Ch App 221). It is unfortunate that the appellant had saddled itself with an unproductive course when another was equally advantageous to it. Instead of wasting time and expending so much money on an appeal to this court, the appellant could have made his application afresh, saving much time and costs. We think that the *de minimis* principle would apply here. The appeal must be dismissed with costs.

[12] I assume the defendant has filed court encl. 7 and 8 out of abundant caution in view of O. 18 r. 19(2) RC and *Pegasus Engineers Sdn Bhd.*

[13] In *See Thong & Anor v. Saw Beng Chong* [2012] 1 LNS 817; [2013] 3 MLJ 235, at p. 817 (CLJ); p. 241 (MLJ), the Court of Appeal held as follows:

> *An applicant for striking out under O. 18 r. 19 can rely on any one or more than one sub-paras (a)-(d). So far, there is no authority to say otherwise. Halsbury's Laws of Malaysia* clearly confirms that an applicant under this rule is entitled to rely on any or all of the grounds specified in the rule. An application under this rule is not void and ineffective merely because sub-para (a) had been pleaded together with sub-paras (b)-(d). The only limitation imposed under sub-r (2) is that for an application under sub-para (a), no evidence is admissible. However, where the court proceeds to decide an application under any other sub-paragraph, affidavit evidence should be admissible. Even though sub-paras (b)-(d) are to be read disjunctively, it does not mean that an applicant cannot rely on more [than] one sub-paragraph in his application, (see *Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd dan lain-lain* [2000] 2 MLJ 38; [2000] 2 CLJ 601; *Pegasus Engineers Sdn Bhd v. Sambu (M) Sdn Bh*d [1998] 4 MLJ 129 and *Malaysian Court Practice 2007* Desk Edition (High Court) p 239).
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> In the present case since the application by the respondent is also based on sub-para (1)(a), the learned judge should have dealt with the said sub-para notwithstanding the fact that both parties had filed their respective affidavits. Those affidavits are actually to be used for the other two sub-paras (b) and (d). *What the learned judge should have done is to deal with the issue under sub-para (a) first and to ignore completely the two affidavits filed by the parties; before proceeding to deal with sub-paras (b) and (d).*

(emphasis added).

[14] I am of the view that there is no need to file two striking out applications as has been done in this case. I opine as such for the following reasons:

(a) *See Thong* is clear that only one striking out application needs to be made. The applicant may rely on any one or all of the grounds provided in O. 18 r. 19(1)(a) to (d) RC as well as the court's inherent jurisdiction. When the court considers the application under O. 18 r. 19(1)(a) RC, the court is barred by O. 18 r. 19(2) RC from considering any affidavit evidence;

(b) there is nothing in O. 18 r. 19 RC which requires two or more applications to be made under any one or more of the grounds provided in O. 18 r. 19(1)(a) to (d) RC;

(c) time, effort and costs will be saved if only one application is made;

(d) if two or more applications are filed under O. 18 r. 19(1) RC, there may be a possibility that these applications may be heard separately which will further delay the disposal of the suit in question; and

(e) *Pegasus Engineers Sdn Bhd* was decided before the introduction of O. 1A of the then Rules of the High Court 1980 (now O. 1A RC) on 16 May 2002. According to O. 1A RC, it is incumbent on the court to have regard to the "overriding interest of justice and not only to the technical non-compliance with" RC – please see the Federal Court's judgment in *National Union of Bank Employees v. Director General of Trade Unions & Anor* [2013] 7 CLJ 957, at 968.

Court's Approach

[15] Based on *See Thong*, I will first decide court encl. 8 under O. 18 r. 19(1)(a) RC as to whether the amended originating summons filed in this suit (amended OS) disclosed any reasonable cause of action or not (first inquiry). For the first inquiry, I will only consider the amended OS and will not take into account any affidavit evidence in compliance with O. 18 r. 19(2) RC.

[16] Court encl. 8 also relied on the court's inherent jurisdiction and O. 92 r. 4 RC. The High Court in *Supuletchimi Karpaya v. Palmco Bina Sdn Bhd* [1994] 2 CLJ 561; [1994] 2 MLJ 368, at 380-381, has held that in deciding under the court's inherent jurisdiction on whether a pleading discloses a reasonable cause of action or not, the court may consider affidavit evidence. For the first inquiry, I will not, with respect, follow *Supuletchimi*. This is due to two reasons. Firstly, I am bound by the Court of Appeal's ruling in *See Thong* not to consider any affidavit evidence for the first inquiry.

Secondly, after the first inquiry, I will consider all the affidavit evidence filed by the parties in a subsequent inquiry (second inquiry) to decide whether or not this suit:

(a) is scandalous, frivolous and/or vexatious under O. 18 r. 19(1)(b) RC;

(b) may prejudice, embarrass or delay the fair trial of this suit under O. 18 r. 19(1)(c) RC; and/or

(c) is an abuse of the process of the court under O. 18 r. 19(1)(d) RC and/or the court's inherent jurisdiction.

Principles Governing Striking Out Applications

[17] In deciding court encl. 7 and 8, I am guided by the following principles:

(a) a pleading can only be struck out in a plain and obvious case, namely where that pleading is obviously unsustainable - please see, for example, the Supreme Court's judgment in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, at 43;

(b) the mere fact that a pleaded case is weak and is not likely to succeed, is not a ground to strike out that pleading – *Bandar Builder Sdn Bhd*, at p. 44; and

(c) the court will assume that the contents of the pleading in question are true – Court of Appeal's decision in *Tuan Ishak Ismail v. Leong Hup Holdings Berhad & Other Appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661, at 679.

[18] In addition to the above principles, I am mindful that every Malaysian citizen has a constitutional right of access to justice under art. 5(1) of our Federal Constitution – please see the Federal Court's judgment in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, at 514-515.

First Inquiry

MAPA Cannot Enforce Employment Contracts Between Its Members And Defendant

[19] The first and second prayers sought to enforce individual contracts of employment between the second plaintiff and MAPA's members on the one hand with the defendant on the other hand (Individual Employment Contracts).

[20] It is trite law that by virtue of the doctrine of privity of contract, only a contracting party may sue and enforce that contract. Suffices for me to cite the following two decisions of our highest courts:

(a) in *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170, at p. 174, on an appeal from Malaysia, the Privy Council decided as follows:

> *The real question which arises as to this agreement is whether it could be enforced by Schmidt who in his personal capacity was not a party to it.* In the first place there can, in their Lordships' view, be no doubt that if the agreement were governed by English Law, Schmidt would be unable to enforce it. Their Lordships need, on this point, do no more than state their agreement with the judgment of the Federal Court which correctly stated the law from well-known passages in the opinions of the House of Lords in *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* [1915] AC 847 at p 853 and *Scruttons Ltd Midland Silicones Ltd* [1962] AC 446 at p 468. *But it was suggested that in this respect the law of Malaysia differed from the law of England in admitting the principle of jus quaesitum tertio. Their Lordships are of opinion that the appellant company failed to make good this contention. Their Lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysian law as to contracts differs in so important a respect from English law*. It is true that section 2(d) of the [Contracts Act 1950 (CA)] gives a wider definition of "consideration" than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. *On the contrary paragraphs (a), (b), (c) and (e) [of s. 2 CA] support the English conception of a contract as an agreement on which only the parties to it can sue.* Reference was made to certain Indian decisions on the Indian Contract Act on which the [CA] is based. These were *Subbu Chetti Arunachazam Chettiar* (1930) ILR 53 Madras 270 (where however it was said that the balance of authority is in favour of the view that a stranger to the contract cannot without more sue to enforce it) and *Khirod Behari v. Dutt Man Gobinda* AIR 1934 Cal 682. But other decisions in a contrary sense were cited which appeared to their Lordships to be more authoritative: their Lordships refer to decisions cited in *Subbu Chetti v. Arunachazam Chettiar* and in *Pollock and Mulla on the Indian Contract Act*, 6th Edition, pp. 21 ff. and to two decisions so recent as 1957 (*Protapmull Rameswar v. State of West Bengal* 1957 61 CWN 78 and *Babu Ram v. Dhan Singh* AIR 1957 Punjab 169). These, in their Lordships' view, confirm that the law was correctly stated by Sir John Beaumont CJ in the Bombay case of *National Petroleum Co Ltd v. Popatlal* AIR 1936 Bom 344. In a passage, which though strictly obiter, was based on a full argument and consideration of the cases, the learned Chief Justice expressed the view that *Khirod Behari Dutt v. Man Gobinda* was opposed to established principle and authority. An argument on this legal issue was, so their Lordships were informed, submitted to the Federal Court: no reference to it appears in their judgment and their Lordships must assume that they did not accept it. The appellants failed to persuade their Lordships that they were wrong.
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> *The 1954 agreement was therefore, in their Lordships' opinion, not enforceable by Schmidt against the appellant company, …*

(emphasis added); and

(b) Gopal Sri Ram JCA (as His Lordship then was) decided as follows in the Federal Court case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393, at p. 119 (CLJ); p. 431 (MLJ):

> The notion that s. 2(d) (CA) had the effect of abolishing doctrine of privity of contract was exploded by the decision of the Privy Council in *Kepong Prospecting Ltd & Ors v. Schmidt* [1968] 1 MLJ 170. The Board there held that our law does not recognise a *jus quaesitum tertio* arising by way of contract. The concatenation of Indian cases giving rise to a conflict of opinion on the subject was referred to in the advice of the Board, which on that occasion was delivered by Lord Wilberforce. …
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> *Kepong Prospecting* is therefore authority for the proposition that the words 'or any other person' appearing in s. 2(d) (CA) are not to be wide enough to exclude the doctrine of privity of contract.

(emphasis added).

[21] I am bound by *Kepong Prospecting Ltd* and *Badiaddin* to hold that MAPA is barred by the doctrine of privity of contract from enforcing the individual employment contracts against the defendant. For the same reason, the pilots employed by the defendant cannot enforce the MOU against the defendant as they are not parties to the MOU despite the fact that the MOU may have been concluded for the benefit of the defendant's pilots. I note that the MOU is the now the subject matter of a pending arbitration.

[22] As MAPA has no right to enforce the individual employment contracts against the defendant, MAPA has no reasonable cause of action to sustain the Amended OS. Accordingly, I allow court encl. 8 under O. 18 r. 19(1)(a) RC.

MAPA Has No Locus Standi To File This Suit In Respect Of Alleged Breaches

[23] The amended OS referred to the arbitration regarding the alleged breaches. The question that arises is whether MAPA has *locus standi* to commence this suit in respect of the alleged breaches.

[24] The defendant has contended that the plaintiffs have no *locus standi* to file this suit and relies on the Federal Court case of *Lembaga Kumpulan Wang Simpanan Pekerja v. Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja* [2000] 3 CLJ 81; [2000] 3 MLJ 65 (*KWSP*'s case).

[25] In *KWSP*'s case:

(a) the respondent is a trade union which purports to represent certain employees of the appellant (appellant's employees);

(b) the respondent filed an originating summons against the appellant and sought for declarations regarding the rights of the appellant's employees;

(c) the appellant applied to strike out the respondent's suit and this application was dismissed by both the High Court and the Court of Appeal;

(d) the Federal Court granted leave for the appellant to appeal on the following question of law (at p. 85 (CLJ); p. 69 (MLJ)):

> Whether a Trade Union in public sector possesses *locus standi* to bring an action on behalf of its members past and present on the individual contracts of employment to which the Trade Union was not a party; and

(e) the Federal Court decided the above question as follows (at p. 98 (CLJ); p. 80 (MLJ)):

> *We feel that no purpose would be served by ordering further proceedings to continue as the respondent clearly has no locus standi to bring an umbrella action on behalf of all its members on their respective individual contracts with their employer, the appellant, for which different individual considerations are relevant and applicable. We are unanimously of the view that both the High Court and the Court of Appeal adopted the wrong approach to an O. 18 r. 19 application because with the respondent having no capacity to sue in the first place, the originating summons simply cannot stand and, therefore, it falls under the category of a case which is obviously unsustainable. Technically, this, of course, does not prevent the employees from bringing actions themselves in their names separately or together.*
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> *On the facts and circumstances of this particular case, we would answer the question posed in the negative, allow the appeal with costs here and in the courts below, and set aside all orders made in those courts.*

(emphasis added).

[26] *KWSP*'s case concerned a trade union and not a registered society such as MAPA. Nonetheless, I find that the *ratio decidendi* of *KWSP*'s case should apply to MAPA because just as in *KWSP*'s case, MAPA is seeking in this suit to enforce the Individual Employment Contracts to which MAPA is not a party. In *KWSP*'s case, the respondent only applied for declarations but in this suit, MAPA has gone even further by applying for injunctive relief against the defendant as per the first and second prayers.

[27] The extension of *KWSP*'s case to registered societies will, in my view, ensure that a registered society does not file any suit to enforce any contract entered by its members with third parties, even if the proposed suit is solely for the benefit of that society's members. It is entirely up to a member of the registered society to sue the contracting party in question.

[28] My decision to extend *KWSP*'s case to MAPA is fortified by the three-two majority decision of the Supreme Court in *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12 (*Lim Kit Siang*'s case).

[29] In *Lim Kit Siang*'s case: A

(a) the respondent applied for a declaration and an injunction. In this suit, MAPA is seeking only injunctive relief against the defendant. Hence, the relevance of *Lim Kit Siang*'s case to this suit;

(b) Salleh Abas LP, Abdul Hamid CJ (Malaya) (as His Lordship then was) and Hashim Yeop Sani SCJ (as His Lordship then was) were the majority judges who decided that the respondent had no *locus standi* to file the suit; B

(c) Salleh Abas LP held at pp. 68-69 (CLJ); p. 20 (MLJ) as follows:

> *Every legal system has a built-in mechanism to protect its judicial process from abuse by busy-bodies, cranks and other mischief-makers by insisting that a plaintiff should have a special interest in the proceedings which he institutes. This special interest is a nexus between him and the party against whom he brings his complaints to court and is known as locus standi.* C
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> *In a public law litigation, the rule is that the Attorney-General is the guardian of public interest. It is he who will enforce the performance of public duty and the compliance of public law. Thus when he sues, he is not required to show locus standi. On the other hand, any other person, however public spirited he may be, will not be able to commence such litigation, unless he has a locus standi, or in the absence of it, he has obtained the aid or consent of the Attorney-General. If such consent is obtained, the suit is called a relator action in which the Attorney-General becomes the plaintiff whilst the private citizen his relator.* I will deal with this aspect in the later part of this judgment. *In the instant appeal, since this is not a relator action the respondent must show that he has the necessary locus standi to commence and maintain the suit.* D E
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> What is the law on *locus standi*? F
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> A clear statement of it was stated by Buckley J in *Boyce v. Paddington Borough Council* [1903] 1 Ch 109 as follows:
>
> > *A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with* (eg, where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, *secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.* G H

(emphasis added);

(d) Abdul Hamid CJ (Malaya) decided at pp. 77-78 (CLJ); p. 27 (MLJ) as follows: I

> *The central issue revolves round the question of "locus standi" of a private person seeking a declaration and an injunction in a case for the enforcement of a public right purportedly for public interest.*

A *"Locus standi"* is generally understood to mean the right of a party to appear and be heard by a tribunal. A litigant is said to have *locus standi*, in effect standing to sue in a court of law, if that court recognises his or her ability to institute and maintain proceedings before it. The question of standing is thus separate and distinct from questions of the substantive merits and the legal capacity of the plaintiff. It follows, therefore, that a
B litigant may lack standing to bring a case which would succeed if brought by the right litigant.

Put in a nutshell, the law of standing to sue has two fundamental rules. First, apart from certain cases in which standing to sue is in the discretion of the court, the plaintiff must possess an interest in the issues raised in the proceedings. Second, where the
C *private plaintiff relies on an interest in the enforcement of a public right and not of a private right, standing will be denied unless the Attorney-General consents to a relator action, or the plaintiff can demonstrate some special interest beyond that possessed by the public generally.*

Now, there are two limbs in the arguments that standing rules help in the
D allocation of scarce judicial resources. One of these is that liberalising the rules will open the flood gates to litigation: see *Dyson v. Attorney-General* [1911] 1 KB 410. The other is that judicial resources being always strictly limited, when there are competing claims for access to the courts by a busybody on the one hand and an individual with a genuine grievance on the other, priority ought to be given to the latter over the former.

E A justification for standing rules relates to standing as a function of the adversary system. Self-interest is seen as the motivating force that will ensure that the parties present their respective positions in the best possible light. If the motivation of self-interest is non-existent so that the ensuing dispute is not with respect to contested rights and obligations of
F the parties themselves, then the assurance of diligent preparation and argument cannot exist. …

The other justification for standing rules relates to the private individual plaintiff suing with respect to a matter of public interest unless the Attorney-General consents reflects a constitutional principle about the division of responsibility between the executive and the judiciary: see eg,
G *Gouriet v. Union of Post Office Workers* [1977] 3 All ER 70; [1978] AC 435 per Viscount Dilhorne. Alternatively, an institutional view is advanced which notes that the public interest embraces broader concerns than those properly addressable by courts of law: …

(emphasis added); and

H (e) Hashim Yeop Sani SCJ expounded the following at pp. 86-87 (CLJ); p. 39-40 (MLJ):

The principle that the jurisdiction of the court can be invoked by one who seeks to protect a legal right or to obtain a declaration of legal rights as between him and some other person or authority has been extended to
I permit the institution of proceedings by the Attorney-General on behalf of the public. The Attorney-General represents the public in this regard. The intervention of the Attorney-General is founded on the principle that the Crown is *parens patriae* and that the Attorney-General appears for and

> represents the public interest. Traditionally, it has been held to be basic that if the Attorney-General does not sue *ex officio* or allow someone else to sue *ex relatione* no one else can claim to represent the public interest.
>
> It is a fundamental principle that private rights can be asserted by individuals, but public rights can only be asserted by the Attorney-General as representing the public. *The courts have no jurisdiction in any circumstances to clothe a plaintiff with the right to represent the public interest. …*
>
> *What then is the proper law to apply to determine the locus standi of the respondent here? In my opinion, the principle in Boyce v. Paddington Borough Council [1903] 1 Ch 109 as approved in Gouriet is still the law applicable in this country. …*
>
> In my view, we ought also to apply the common law principle enunciated in *Boyce* by virtue of section 3 of the Civil Law Act 1956.

(emphasis added).

[30] Based on the majority decision of the Supreme Court in *Lim Kit Siang*'s case, MAPA must show either MAPA's private right has been infringed by the defendant or if no private right of MAPA has been breached, whether MAPA has suffered special damage peculiar to it.

[31] I find that based solely on the amended OS, MAPA has failed to show that:

(a) MAPA's private right has been infringed by the defendant; and

(b) MAPA has not suffered any damage, let alone special damage, due to the alleged breaches.

[32] Based on the reasons stated in the above sub-paras. 31(a) and (b), I am of the considered view that MAPA has failed to satisfy that it has the necessary *locus standi* to file the amended OS. As such, I allow court encl. 8 on this ground too.

This Suit Did Not Apply For Declaratory Relief

[33] If MAPA has merely sought for a declaration under s. 41 of the Specific Relief Act 1950 and O. 15 r. 16 RHC, MAPA need not prove that it has a subsisting cause of action against the defendant. I rely on the Court of Appeal's judgment in *Dato' Raja Ideris Raja Ahmad & Ors v. Teng Chang Khim & Ors* [2012] 2 CLJ 288; [2012] 5 MLJ 490, at pp. 298-300 (CLJ); pp. 498-499 (MLJ), as follows:

> The question raised in the aforesaid submissions may be formulated as follows:
>
> > Upon a true construction of s. 41 and O. 15 r. 16, where the OS prays for a declaratory judgment in the form of declarations, is it proper to strike out the OS on the ground that it discloses no reasonable cause of action?
>
> …

A declaratory judgment merely states the rights or legal position of the parties as they stand without altering them in any way: see *Gan Hwa Kian & Anor v. Shencourt Sdn Bhd* [2007] 4 MLJ 554. 'A declaration can be used to ascertain and determine the legal rights of parties or to determine a point of law': *Brett Andrew Macnamara v. Kam Lee Kuan* [2008] 2 MLJ 450 at p 459 per Balia Yusof J (now JCA). By virtue of s 41 and O. 15 r. 16, the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion. The court has power to grant a declaration irrespective of whether an application has a cause of action or not and even if a cause of action does not exist at the time of the filing of an application: see eg *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd, intervener)* [1995] 2 MLJ 421; *BSN Commercial Bank (M) Bhd v. Pentadbir Tanah Daerah, Mersing* [1997] 5 MLJ 288; and *Cekal Berjasa Sdn Bhd v. Tenaga Nasional Bhd* [2006] 4 MLJ 284 at p 294, per Abdul Malik Ishak J (now JCA).

The jurisdiction to make a declaration under the rule is not confined to cases in which the plaintiff has a complete and subsisting cause of action: *Guaranty Trust Co of New York v. Hannay* [1915] 2 KB 536 (CA) (Eng); *Dewan Singh v. M Thynappa Ltd & Yeo Teck Chiang* [1939] MLJ 278; *Haji Hussin bin Haji Ali & Ors v. Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 (FC); *Karpal Singh v. Sultan of Selangor* [1988] 1 MLJ 64; and *Tengku Mariam binte Tengku Sri Wa Raja & Anor v. Commissioner for Religious Affairs, Terengganu & Ors* [1969] 1 MLJ 110.

(emphasis added).

[34] In this suit, MAPA has sought for injunctive relief only. The plaintiff's amendment application has been allowed and yet, MAPA chose not to apply for purely declaratory relief. In view of the first and second prayers sought in the amended OS, *Lim Kit Siang*'s case will apply to require MAPA to show that it has the necessary *locus standi* to apply for injunctive relief against the defendant.

Effect Of First Inquiry

[35] The result of the first inquiry is that MAPA has neither reasonable cause of action nor *locus standi* to bring this suit. The Federal Court held in *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 1 LNS 130; [1979] 2 MLJ 240, at 244, that when a plaintiff has no cause of action against a defendant, that plaintiff's suit is vexatious, frivolous and constitutes an abuse of court process.

[36] Based on *Yeng Hing Enterprise Sdn Bhd*, I hold that the amended OS is vexatious, frivolous and constitutes an abuse of court process.

Second Inquiry

[37] I shall now consider court encl. 7 and 8 under O. 18 r. 19(1)(b), (c), (d) and O. 92 r. 4 RC as well as the court's inherent jurisdiction. For the second inquiry, I will consider affidavits adduced by all the parties.

Availability Of Two Alternative Avenues To MAPA

[38] MAPA relies on cls. 17, 21 and attachment B to support the amended OS. Clause 17 provides for rest periods for the defendant's pilots while cl. 21 stipulates their 'off days'. Attachment B provides 'additional duty limitations/conditions'. MAPA essentially contends that the defendant has breached cls. 17, 21 and Attachment B and this has therefore endangered the safety of the defendant's aircrafts and occupants.

[39] MAPA further avers that the defendant has contravened regs. 79 and 80 CAR. The relevant parts of regs. 79 and 80 CAR read as follows:

> *79 Fatigue of crew – operator's responsibilities*
>
> …
>
> *(2) The operator of an aircraft to which this regulation applies shall not cause or permit any person to fly therein as a member of its crew if he knows or has reason to believe that the person is suffering from, or having regard to the circumstances of the flight to be undertaken, is likely to suffer from such fatigue while he is so flying as may endanger the safety of the aircraft or of its occupants.*
>
> *80 Fatigue of crew and responsibility of crew*
>
> *(1) No person shall act as a member of the crew of an aircraft to which these Regulations apply if he knows or suspects that he is suffering from, or having regard to the circumstances of the flight to be undertaken, is likely to suffer from such fatigue while he is so flying as may endanger the safety of the aircraft or of its occupants.*

(emphasis added).

[40] MAPA's complaint in the amended OS relates solely to aviation safety. I refer to reg. 180 CAR which provides as follows:

> *180 Power to prevent aircraft flying*
>
> (1) *If it appears to the Director General* [defined in s. 2(1) of the Civil Aviation Act 1969 *[CAA]* as the Director General of Civil Aviation Malaysia (DG)] or an authorised person *that any aircraft is intended or likely to be flown:*
>
> …
>
> (b) *in such circumstances that the flight would be in contravention of any other provision of [CAR] … and be a cause of danger to any person or property whether or not in the aircraft;*
>
> …
>
> *the [DG] or that authorised person may direct the owner, operator of the commander of the aircraft that he is not to permit the aircraft to make the particular flight or any other flight of such description as may be specified in the direction until the direction has been revoked by the [DG] or the authorised person, and the [DG] or the authorised person may take such steps as are necessary to detain the aircraft.*

(emphasis added).

[41] It is clear from reg. 180(1)(b) CAR that MAPA's concern regarding aviation safety may be sufficiently addressed by making the necessary complaint to the DG regarding the alleged breaches and the DG has adequate powers to deal with such a complaint. Section 54(i) of the Specific Relief Act 1950 (SRA) provides as follows:

> *54 Injunction when refused*
>
> *An injunction cannot be granted:*
>
> …
>
> *(i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;*

(emphasis added).

[42] In *Lim Kit Siang*'s case, at p. 68 (CLJ); p. 20 (MLJ), Salleh Abas LP in the Supreme Court struck out the suit based on s. 54(d) and (k) SRA as follows:

> *Refusal to grant the injunction in this case is also consistent with paragraphs (d) and (k) of (s. 54 SRA) in that no injunction can be granted "to interfere with the public duties of any department of any Government" nor can it be granted "where the applicant has no personal interest in the matter". Personal interest here must surely mean legal interest and not merely political interest.*
>
> *In this case, since not only has the respondent no cause of action against UEM but the court also has no power to issue the injunction, interim or otherwise, the respondent's suit against UEM is therefore unmaintainable as it is also vexatious, frivolous and constitute an abuse of the judicial process.*

(emphasis added)

[43] It is to be noted that the DG has the duty and function under s. 2B(a) and (c) of the Civil Aviation Act 1969 to exercise regulatory functions in respect of civil aviation and to ensure safety of civil aviation in this country. Article 3.2 MOU also recognised DG's pivotal role by providing that when there is a need to vary the seventh schedule, the defendant 'shall' apply to the Department of Civil Aviation (headed by the DG) for such a variation.

[44] I hold that there is an equally (if not more) efficacious avenue for MAPA to complain to the DG in respect of the alleged breaches. There is no necessity to file this suit. Hence, s. 54(i) SRA applies in this case to bar the first and second prayers. Based on Salleh Abas LP's judgment in *Lim Kit Siang*'s case, the amended OS is vexatious, frivolous and constitutes an abuse of court process.

[45] As explained by Salleh Abas LP (at p. 20) and Abdul Hamid CJ (Malaya) (at p. 27) in *Lim Kit Siang*'s case, MAPA can apply to the Attorney General (AG) to commence a relator action in respect of the alleged breaches (relator action). There is therefore a second efficacious alternative available to MAPA in the form of a relator action. MAPA has not adduced any

evidence that MAPA has applied for the AG to file a relator action against the defendant and such an application has been rejected by the AG. Once again, s. 54(i) SRA applies to strike out the amended OS.

Result Of Second Inquiry

[46] Based on the above two alternatives available to MAPA which attracts the application of s. 54(i) SRA, I allow court encl. 7 on the ground that this suit is vexatious, frivolous and constitutes an abuse of judicial process.

No Prejudice To MAPA And Its Members If This Suit Is Struck Out

[47] There is no prejudice to the second plaintiff and MAPA's members if I strike out this suit. This is due to the following reasons:

(a) the second plaintiff and MAPA's members have the right to take any legal action against the defendant in respect of the individual employment contracts as they see fit;

(b) the arbitration is already on foot and MAPA can ventilate whatever grievance it has against the defendant in the arbitration;

(c) MAPA and/or any of its members may complain to the DG under reg. 180 CAR in respect of the alleged breaches; and/or

(d) MAPA and/or any of its members may apply to the AG to commence a relator action concerning the alleged breaches.

Costs

[48] After I had delivered my oral decision to allow court encl. 7 and 8 on 8 September 2014, I invited learned counsel for both sides to submit on the quantum of costs to be awarded. The plaintiffs' learned counsel, Mr DS Prasad, proposed RM5,000 as costs to be paid by the plaintiffs to the defendant in respect of both court encl. 7 and 8. The defendant's learned counsel, Ms Himahlini Ramalingam proposed costs of RM10,000.

[49] I accepted Mr Prasad's proposal on costs as I acknowledged that this suit had been filed by MAPA out of its sense of 'duty' and benevolent concern for all its members. I also take note of MAPA's public spiritedness in promoting civil aviation safety.

Court's Decision

[50] Premised on the above reasons, I order the following:

(a) Court encl. 7 and 8 are allowed with one order of costs of RM5,000. There should only be one order of costs for both court encl. 7 and 8 as both applications had been heard together; and

(b) in view of the above decision, court encl. 5 is struck out with no order as to costs.